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NO. 87-

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IN THE

Supreme Court of the United States

October Term, 1987

ARNALDO JIMENEZ-FUENTES, HIS WIFE OLGA OSORIO AND THEIR CONJUGAL PARTNERSHIP AND JOSE VICENTE VAZQUEZ, HIS WIFE CELESTINA ALMODOVAR, AND THEIR CONJUGAL PARTNERSHIP

Petitioners

v.

HON. JAIME TORRES GAZTAMBIDE, AS SECRETARY OF HOUSING OF THE COMMONWEALTH OF PUERTO RICO, AND IN HIS PERSONAL CAPACITY, HIS WIFE MRS. CARMEN GLADYS VINCENTY, AND THEIR CONJUGAL PARTNERSHIP; ROLANDO QUEVEDO DEL RIO, AS EXECUTIVE DIRECTOR OF THE HOUSING AND URBAN DEVELOPMENT CORPORATION, AND IN HIS PERSONAL CAPACITY, HIS WIFE MRS. GINNY MOTTA, AND THEIR CONJUGAL PARTNERSHIP.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Has this Court given license under the *Elrod-Branti* doctrine for government to justify patronage dismissals or demotions based on partisan political interest or is an overriding vital state interest necessary to justify the encroachment of First Amendment rights.

2. Whether the holding of the Court of Appeals overturning the interpretation of the Supreme Court of Puerto Rico of the *Elrod-Branti* principle regarding CRUV's Regional Directors is warranted.

3. Whether the Court of Appeals acted under the restraint dictated by this Court and Rule 52 of the Federal Rules of Civil Procedures in its function of Appellate Review.

4. Whether the Court of Appeals correctly applied the "clearly erroneous standard" to the findings of the District Court and then based its own divergent findings on testimony of a witness to which the trier of facts gave no weight because of the witness's demeanor and the content of his testimony.*

*All parties to the proceedings from the Court of Appeals from whose judgment review is sought are included in the caption of the case before this Court.

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OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 803 F.2d 5 (1st Cir. 1986), and appears reprinted in App. H at p. A-61. The Opinion of the District Court appears reprinted in Appendix A at p. A-1.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 20, 1986 as it appears from Appendix C at p. A-19. A Memorandum for Petition for Rehearing for the First Circuit was entered on February 6, 1986, App. D at p. A-21, Mandate of the Court of Appeals was entered February 14, 1986, App. E at p. A-27.

On February 19, 1986, the Court of Appeals reversed its prior position and ordered that the case be reheard En Banc and vacated the Opinion and Judgment of December 20, 1985. App. B at p. A-11 and C at p. A-19. On September 19, 1986, the Court sitting En Banc entered Opinion and Judgment, App. G at p. A-31 and H at p. A-61.

Petitioners timely filed a Petition for Rehearing which was denied on October 21, 1986, App. I at p. A-63. The statutory 90 days to file this Petition for Certiorari will accrue on January 19, 1987, a national holiday, extended to January 20, under Rule 29.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The First Amendment applies to the Commonwealth of Puerto Rico through either the Fifth or the Fourteenth Amendments.

STATEMENT OF THE CASE

The issue in this case centers around the balance between the rights of successful politicians to dispense the spoils of the victor vis a vis the rights of citizens, under the Constitution, to associate freely for any legitimate purpose without being the subjects of persecution and harassment for exercising that right.

Senior Circuit Judge Bailey Aldrich characterized his Opinion in *De Abadia v. Izquierdo-Mora*, 792 F.2d 1187 (1st Cir. 1986), as the Court's "second installment in a saga of Puerto Rican politics following the gubernatorial election of November 1984," meaning that this *Jiménez* and *Vázquez* case is the first installment. *De Choudens, et al. v. The Government Development Bank, et al.*, 801 F.2d 5.[1], is the third.

And again citing Judge Aldrich in *Jiménez-Fuentes v. Torres-Gaztambide*, 779 F.2d 765 (1st Cir. 1985)[2] (since withdrawn), "while the dangers of war are difficult to contain, the Courts, federal and state, have made determined efforts in the lesser field" (politics).

Politics is colorful and powerful. So much so that at times the Courts, as happened in this case, lose sight of the fact that the framers of our Constitution in the First Congress on September 25, 1789 proposed Amendment X, which dictates that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

No powers were, or have been, under the Constitution, reserved to political parties.

If the decision of the Court of Appeals for the First Circuit stands, the Popular Democratic Party of Puerto Rico (PDP), which

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[1] The *De Choudens* case, 801 F. 2d 5, and the instant case are referred to as "companion" cases as Opinions were entered in both cases on September 19, 1986, per Coffin, Circuit Judge. The *De Choudens* case appears in the Appendix (App.) as App. J at p. A-65. Petition for Certiorari was filed before this Court on December 18, 1986.

[2] The original *Jiménez-Fuentes* opinion by a panel of three judges, Campbell, Chief Judge, Aldrich, Senior Circuit Judge and Torruella, Circuit Judge, was later withdrawn. See App. B at p. A-11.

controls the Executive, Legislative (Senate and House of Representatives) and Judicial branches of Government[3] will have absolute control over the political favors that can be dispensed, not only in housing, but in health, education, employment, water, electricity, telephone communications, shipping, transportation, construction industry, social services, agriculture, police, workmen's compensation, in fact every conceivable aspect of the life of an American citizen residing in Puerto Rico.

After the 1984 elections in Puerto Rico the incoming Popular Party initiated a political purge to remove all members of the New Progressive Party (NPP) holding positions of certain authority in the Government.

But the purge is not limited to trust and confidence positions. Career employees, who are supposed to be protected from political harassment under Act No. 5 of 1975, the Puerto Rico Public Service Personnel Act. 3 P.R. Laws Ann. 1301, *et seq.*, were demoted or transferred or placed in untenable situations to force their resignation. *María M. Agosto, et al. v. Awilda Aponte Roque, et al.*, 631 F. Supp. 1082.

Non-tenured employees in low-salaried jobs, who have several years of service to the Government, have been removed to be substituted by members of the Popular Party. *Baldomero Arbona Torres, et al. v. Awilda Aponte Roque, et al.*, Case No. 85-1367, DCPR, August 14, 1986.

"The situation is critical and calls for urgent remedial judicial creativity." *Colón v. CRUV*, 115 D.P.R. 503 (1984) (Footnote at p. A-80, App. K at p. A-75).

Petitioner Arnaldo Jiménez-Fuentes has served the Government of Puerto Rico for almost 30 years. He has a masters degree in Public Administration from the University of Puerto Rico. Petitioner Jose Vicente Vázquez, a civil engineer, with a bachelor's degree in Business Administration is also a career public servant of ten years.

Both are affiliated to the New Progressive Party, which controlled the governorship from 1977 to 1984, but which lost the 1984 elections.

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[3] Six out of the present seven justices of the Supreme Court of Puerto Rico have been designated by Governor Rafael Hernández Colón, President of the Popular Party; one in his 1973-1976 term as Governor, and five in his present term.

On March 1985, Jiménez held the position of Regional Director for the Region of Caguas of the Urban Renewal and Housing Corporation (CRUV). Vázquez held a similar position as Regional Director for the San Juan I Region.

The position petitioners held is classified as one of trust and confidence under the Public Service Personnel Act of Puerto Rico, 3 P. R. Laws Ann. 1350 (App. N at p. A-87), and the Personnel Regulations of the Urban Renewal and Housing Corporation (App. O at p. A-89).

In March 1985, through identical letters signed by respondents Jaime Torres Gaztambide and Rolando Quevedo del Río, petitioners were removed from their positions and demoted to lesser career positions.

Petitioners brought an action before the District Court for Puerto Rico, under 42 U.S.C. 1983, seeking reinstatement and damages from respondents.[4]

After a two-week hearing and extensive testimony and documentary evidence, the U.S. District Court found that in order to effectively perform the duties of Regional Director of CRUV, the incumbent did not have to be a member of the Popular Party, hence that such affiliation was not an appropriate requirement under this Court's formulation in *Branti v. Finkel*, 445 U.S. 507 (1980).

The District Court's Opinion and Order granting petitioners a preliminary injunction and reinstating them to their positions is App. A at p. A-1.[5]

Respondents appealed to the Court of Appeals for the First Circuit and a three-judge panel affirmed by Opinion (App. B at p. A-11) and Judgment (App. C at p. A-19) entered December 20, 1985.

Respondents filed a Petition for Rehearing En Banc, which was initially denied by the Court, through a Memorandum dated February 6, 1986 (App. D at p. A-21).

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[4] Respondent Jaime Torres Gaztambide resigned as Secretary of Housing of the Commonwealth of Puerto Rico in January 1986 and was replaced by Ariel Nazario. Respondent Rolando Quevedo del Rio resigned as Executive Director of C.R.U.V. in December 1985 and was replaced by Nereida Falto de Cole.

[5] The Opinion and Order was handed from the Bench and transcribed by the Court's reporter Cecil Ennett. It is included in the Appendix exactly as it was filed.

The Mandate was entered on February 14, 1986 (App. E at p. A-27) and on February 19, 1986 an Order (App. F at p. A-29) was entered, vacating the prior Opinion and granting the En Banc consideration.

On September 19, 1986, the Court of Appeals entered Opinion (App. G at p. A-31) and Judgment (App. H at p. A-61) reversing the granting of the preliminary injunction by the U.S. District Court on the grounds that the District Court had abused its discretion in granting injunctive relief.

A Request for Rehearing was timely filed with the Court of Appeals. On October 21, 1986, Order was entered denying the rehearing (App. I at p. A-63).

In Opinions delivered the same day in this and a companion case of *De Choudens v. Government Development Bank*, supra, the Court announced an interpretation of the *Elrod-Branti*[6] doctrine that deviates not only from this Court's doctrine, but also is unparalleled by any other Court of Appeals.

In *De Choudens* the Court of Appeals extends protection in employment to Ms. De Choudens, Senior Vice President and Director of the Area of Finance of the Government Development Bank for Puerto Rico, even though the Court found her to hold a confidential position and to be a policymaker. The Court of Appeals affirmed the preliminary injunction granted by the District Court.

In *Jiménez-Fuentes* the Court denied the protection in employment to Jiménez and Vázquez based on the fact that the position of Regional Director of CRUV relates to partisan political interest or concerns. The Court of Appeals completely discarded the fundamental precept of *Elrod* and *Branti* in that the encroachment on First Amendment rights will only be justified when there is at stake a paramount or vital governmental interest.[7]

"If an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the states' vital interest in maintaining

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[6] *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Branti*, supra.

[7] In *Elrod* the plurality emphasized that patronage dismissals could be justified only if they advanced a governmental, rather than a partisan interest. *Elrod*, 427 U.S. at 362; *Branti*, footnote 12, 445 U.S. at 517.

governmental effectiveness and efficiency." *Elrod*, 427 U.S. at 366; *Branti*, 445 U.S. at 517.

A. *The Urban Renewal and Housing Corporation (CRUV):*

The Department of Housing of the Commonwealth of Puerto Rico operates through three affiliated agencies: the Urban Renewal and Housing Corporation (CRUV), the Rural Housing Administration and the Housing Bank.

CRUV provides housing for middle- and low-income people in housing developments wholly subsidized as to construction and operation by the federal government.

The political orientation of each of the two major parties in Puerto Rico in the matter of political status for the Island[8] does not have any impact on CRUV's housing programs, which are geared to the Housing and Urban Development (HUD) federal agency.

Petitioners were Regional Directors, Jiménez for the Caguas Region and Vázquez for the San Juan I Region of CRUV.

Because of its relation with HUD, CRUV is constantly monitored by the federal agency and every aspect of the housing program under CRUV must follow strict operational guidelines, with little or no discretion granted to the Regional Director to deviate from the norms and standards.

CRUV is divided into eleven regions in Puerto Rico, and the administrative standards are the same for all eleven regions, again with no discretion given to any one of the eleven Regional Directors to deviate from the established norms and procedures.

B. *Petitioners' Position and Duties in the Urban Renewal and Housing Corporation:*

Under CRUV's Executive Director, respondent Quevedo del Río, there is an Associate Director of Public Housing, a Deputy Associate Director and then the eleven Regional Directors. These Regional Directors are like the employee supervisors in *Elrod*, 427

[8] The New Progressive Party strives for eventual Statehood for Puerto Rico, while the Popular Party strives for more autonomy for the Commonwealth of Puerto Rico.

U.S. at 369, in that they "may have many responsibilities, but those responsibilities may have only limited and well defined objectives."

Regional Directors have uniform duties and responsibilities, in other words, they have to march in step with each other. Their duties are strictly cabined. *Alfaro de Quevedo v. De Jesús Shuck*, 556 F.2d 591 (1st Cir. 1977).

Petitioner Jiménez in Caguas was subject to the same regulations, directives, programs, duties and responsibilities as Vázquez in San Juan I and the other nine Regional Directors.

There is no way in which the position of Regional Director can authorize "either directly or indirectly, meaningful input into government decision making on issues where there is room for principled[9] disagreement on goals or their implementation." *Nekolny v. Painter*. 653 F.2d 1164, 1170 (7th Cir. 1981).

A Regional Director can provide an idea to top management in CRUV and, if the Executive Director approves it, and adopts it, it will then flow down as an *order* to the eleven Regional Directors to follow; in other words, it becomes a guideline.

Until the Executive Director acts, the best idea is not yet "meaningful input into government decision making."

C. *The District Court's Decision:*

After ten days of testimony and documentary evidence the Court found that there was little discretion involved in the position of Regional Director. The Court held:

> "It would seem therefore, that there is little discretion involved in the position of Regional Director. Hence there would be very little margin for program interference due to political differences between the Regional Director and the Agency Heads, who are primarily responsible for carrying out clearly defined regulations and guidelines in furtherance of the Administration's programs and goals.

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[9] The Court of Appeals in *Jiménez-Fuentes* substituted *political disagreement* for *principled disagreement*, emphasizing the Court's criteria that what is determinative of the protection or exception from *Branti* is not vital governmental interest but partisan political interest.

> Any departure therefrom by a particular Director, be it due to political beliefs or mere incompetence, can be readily ascertained and dealt with following the pertinent administrative procedures." (App. A at p. A-5.)

Finally the Court indicated:

> "Based on the findings of discrimination made by the Court today, we are convinced that the plaintiffs have met their burden in establishing their likelihood of success on the merits.
> The public interest in the efficient performance of public functions cannot be equated with allowing a political party total license to appoint employees ...[of its] political leanings to positions of trust, or a blank license.
> There is also a public interest in the protection of the constitutional rights of government employees, which must be safeguarded.
> Upon careful examination of the evidence presented in these two cases and the equities involved, plaintiffs' motions for the issuance of a preliminary injunction are hereby granted."

D. *Decision of the Court of Appeals:*

The Court of Appeals in its En Banc decision reversed the District Court's Order granting petitioners' request for a preliminary injunction[10].

The Court adopted an interpretation of the *Elrod-Branti* standard based mainly on that the position under scrutiny be related to partisan political interest or concerns in order to be excepted from First Amendment protection.

The Court adopted the following two-step analysis. First, "[a] threshold inquiry, which derives from *Branti*, involves examining whether the position at issue, no matter how policy-influencing or confidential it may be, relates to 'partisan political interests ... [or]

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[10] The decision of the Court of Appeals was based on a full record containing extensive evidence, testimonial and documentary. Petitioners pray that this Court review the Appeal Court's decision under *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 106, S. Ct. 2169 (1986).

concerns' 445 U.S. at 519." (App. G at p. A-39.) "If this first inquiry is satisfied, the next step is to examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other officeholder whose function is such that party affiliation is an equally appropriate requirement." *Id.*

REASONS FOR GRANTING THE WRIT

First: The Court of Appeals for the First Circuit has decided a question under the First Amendment in conflict with applicable decisions of this Court in *Elrod v. Burns*, supra. and *Branti v. Finkel*.

The Opinion in *Elrod v. Burns* was written with the express purpose of limiting patronage dismissals to a minimum. In so doing Justice Brennan's Opinion went so far as to declare patronage dismissals a practice repugnant to the Constitution.

Elrod was thus a prohibition against patronage dismissals and any attempt to rationalize its meaning and message is futile.

The Opinion could not muster enough participants among the Justices to become a majority Opinion and it left standing the "labels" for the positions ("policymaking," in Justice Brennan's Opinion).

Justice Stevens, with whom Justice Blackmun joined, refused to join the plurality's "wide ranging Opinion" but concurred in its judgment.

> "The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot." (See *Perry v. Sindermann*, 408 U.S. 593, 597-598, 92 S.Ct. 2694, 2697-98, 33 L.Ed. 2d 570.)

Justice Stevens utilized the "confidential" criterium, apparently as a trait synonymous with "policymaking." It would seem obvi-

ous that a federal, state or local officer would not select any employee who is not privy to his *confidence* to help him formulate *policy*.

But governments are run by politicians and the impact of *Elrod* curtailing patronage dismissals was circumvented whenever possible. While in *Elrod* the Court speaks about an employee who "formulates plans for the implementation of broad goals," the Court in *Nekolny v. Painter*, restates it as, "policy implementation." It would appear from *Elrod* that the controlling action that would exempt the position from First Amendment protection would be *formulating* the plans, not *implementing* them.

This Court, four years after *Elrod*, handed down the Opinion in *Branti v. Finkel*, 446 U.S. 507 (1980).

This time, with a more functional approach, the Court instructed that *labels* should be discarded and the test would be from then on, "[I]n sum, the ultimate inquiry is not whether the label 'policymaking' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

The decision was a majority decision of Justices. But the impact of *Branti* and its effect in better understanding *Elrod* stands in the Dissenting Opinion of Justice Powell, in which Justices Renquist and Stewart joined, when he declares that: "[T]he Court today continues the evisceration of patronage practices begun in *Elrod v. Burns*...."

As expected, government officers at all levels have searched for loopholes in the *Elrod-Branti* doctrine to circumvent its prohibition of patronage dismissals.

The instant case is a classic example and the Court of Appeals has given its imprimatur to what is and will continue to be the practice this Supreme Court wants to suppress because the Constitution so demands.

When the Opinion of the Court of Appeals in *Jiménez-Fuentes* is analyzed together with its companion decision in *De Choudens v. the Government Development Bank*, one cannot but conclude that the test in *Jiménez-Fuentes* will be the *antithesis* of the *Elrod-Branti* doctrine. Let us compare the two.

Ms. Zaida De Choudens is the Senior Vice President of the Finance Area of the Government Development Bank, who directly

serves the President, and is the Executive Vice President of the Bank. In *De Choudens* (App. J at p. A-65) the Court held:

> "In this case, we affirm the district court's grant of a preliminary injunction because, although the position at issue involves policymaking, the reposing of confidence, and communicating, we presently conclude that such functions are so remote from advancing or thwarting the agency's partisan-responsive goals that political affiliation would not be considered an appropriate requirement."

In the same case the Court holds:

> "In *Jiménez-Fuentes*, we reversed the issuance of an injunction, concluding that the position at issue (regional director of a housing agency) resembled one where, because it involved policymaking, confidential, and spokesperson functions in an area responsive to a party's governmental goals, political affiliation was an appropriate requirement."

De Choudens deals with finances inside a Bank office. But Jiménez and Vázquez are involved with housing for people, and people are votes, and votes keep political parties in power.

According to the Court of Appeals' interpretation of *Elrod-Branti*, any position that signifies a *multiplying factor* that the party in power can control, and with which it can utilize the fringe benefits of government to garner more votes for the next elections, must be vacated. That is against *Elrod*.

In that way the in-party can perpetuate its power and its hold over the people. That is against *Elrod* and *Branti*.

In Puerto Rico, there is not a single essential service that is not controlled by the government.

So in order to be the recipient of low-rent housing, or to have your papers properly filed to qualify for a plot of land, or to have your telephone repaired promptly, or to have electricity or water installed, or to get a loan as a farmer, or to be named a teacher in the public school system, or for myriad other services, it will be an *appropriate* thing to do to bury the persons' political beliefs, keep silent and join the Popular Democratic Party.

That way the citizen makes sure that the doors to the Regional Offices of the different government agencies are open for him. It is winner take all and nothing for the loser, which means *nothing* for more than half the voters, their families and children in Puerto Rico. This is precisely what this Court condemned in *Elrod*, 427 U.S. at 357-359.

Second: The Court of Appeals has decided the federal question in conflict with Decisions of the Supreme Court of Puerto Rico in its efforts to curb the abuses of political patronage rampant in Puerto Rico.

In 1950 Congress granted Puerto Rico a measure of self-government and the Constitution of Puerto Rico was adopted in 1952, creating the Commonwealth of Puerto Rico (El Estado Libre Asociado de Puerto Rico). *Calero Toledo v. Pearson Yacht Leasing Co.* 416 U.S. 663, 94 S.Ct. 2080.

In 1967 Luis A. Ferré founded the New Progressive Party, hereinafter designated NPP (Partido Nuevo Progresista).

Due to a split in the ranks of the Popular Party, the NPP won the 1968 elections by a plurality and Luis A. Ferré was elected Governor of Puerto Rico. The NPP captured the House of Representatives and the PDP held the Senate of Puerto Rico.

Santos Rivera Pérez was elected Mayor of Guaynabo, a town near San Juan, on the NPP ticket, and as soon as he took the oath of office as mayor, he summarily removed 35 temporary employees, crew foremen (capataces de brigada), who were "Populares." This was in January 1969. Hundreds of Populares were removed by the incoming NPP administration.

On December 7, 1972, the Supreme Court of Puerto Rico entered judgment in the case of *Báez Cancel, et al. v. Rivera*, 100 D.P.R. 982 (1972). See *Esther Pedroza Gabriel v. Celeste Benitez, et al.* 390 F. Supp. 988 (1975).

For the first time in 32 years, since the advent of the Popular Democratic party in 1940, and twenty years after the adoption of the Constitution of Puerto Rico, the Commonwealth constitutional guarantee of freedom from persecution for political belief was restated in a Decision of the Puerto Rico Supreme Court.

That same year, 1972, the PDP won the elections in Puerto Rico, controlling the governorship and the legislature.

As expected, political patronage dismissals were the order of the day at the start of the new administration.

The Injunction Act of Puerto Rico, 32 P.R. Laws Ann. § 3521, *et seq.*, expressly prohibited the issuing of an injunction "against an officer corporation or agency of government based on a law enacted by the Legislature of Puerto Rico." 32 L.P.R.A., § 3524.

NPP plaintiffs in the cases of *Rivera Morales v. Benítez*, 542 F.2d 882 (1976); *Oppenheimer Méndez v. Acevedo*, 388 F. Supp. 326, and countless others, had to appear before this United States District Court for the District of Puerto Rico to claim their rights under 42 U.S.C. 1983.

Others, such as Juan H. Colón, Luis R. Castañeda and César Rivera Flores, filed suit in the Superior Court of Puerto Rico and, eleven years later, were revindicated in the seminal case of *Colón v. CRUV*, 115 D.P.R. 503, Opinion handed down by the Supreme Court of Puerto Rico on June 4, 1984. (App. K at p. A-75.)

The PDP-controlled legislature, appalled by jury-awarded compensations for civil rights violations in the Federal District Court of Puerto Rico, amended Section 3524 of the Injunction Act, giving access to plaintiffs in the Courts of Puerto Rico for violations of any "rights, privileges and immunities guaranteed by the Constitution of the United States." Puerto Rico Act No. 12 of August 8, 1974, 32 L.P.R.A., § 3524 (Supplement).

The Puerto Rico personnel law at that time and until 1975, was Act No. 345 of May 12, 1947, 3 L.P.R.A., § 641 *et seq.*

Under said Act 345, government employees were classified as in the Competitive Service (Servicio por Oposición); Non Competitive Service (Servicio sin Oposición) and Exempt Service (Servicio Exento). *Elisa Díaz Gonzalez v. Colón González*, 536 F.2d 453 (1976).

Under that Act most government employees were not covered by the Merit System as most of the government agencies and the municipalities were classified under the Exempt Service. 3 L.P.R.A. § 648, listed forty government agencies as Exempt Service classifications.

On October 14, 1975, Act No. 5, Puerto Rico Public Service Personnel Act was enacted, 3 L.P.R.A., § 1301, *et seq.*

The fundamental changes were:

1. Competitive Service employees would be known as "career employees," and could only be removed for just cause.
2. Non Competitive employees would become "trust and confidence" employees and they could be employed and removed at will by the nominating authority.
3. All employees in the government of Puerto Rico, its agencies and instrumentalities, were covered by the Act and the Merit Principle, the difference being that the former Exempt Service agencies, such as the municipalities, would be considered Individual Administrators and could enact their own Personnel Rules and Regulations as long as the Merit Principle was included and they were submitted to the Central Personnel Office for approval.
4. Certain government entities, such as the Court System, the Legislature, the University of Puerto Rico and such government agencies which operate as private concerns, are excluded from the Act in all regards, except for the Merit Principle embodied in the Act. *Reyes Coreano v. Director Ejecutivo*, 110 D.P.R. 40 (1980).

The Supreme Court of Puerto Rico has consistently admonished against the practice of patronage dismissals and harassment, since 1972, in *Báez Cancel v. Rivera*, 100 D.P.R. 982 (1972).

In *Báez*, supra, the Puerto Rico Supreme Court indicated:

> "Section 1 Art. II of the Constitution of the Commonwealth of Puerto Rico proscribes in a clear manner that 'no discrimination shall be made on account of race, color ... political or religious ideas.' The proscription of discrimination is clear and final. Its text does not permit any distinction. It means to say what it says. That the State in any of its multiple functions or services shall not discriminate against a citizen because of the mere fact that the latter is colored, an atheist, or on account of his political ideas. Any other construction would enervate its efficacy. To strengthen it and not to weaken it is our duty, as the principal custodians of the Constitution."

In *Ramos Villanueva v. Secretary of Commerce*, 112 D.P.R. 514 (March 31, 1982), the Puerto Rico Supreme Court adopted the *Elrod-Branti* principle, when it ordered the reinstatement of Ramos to his position as Regional Director for the Region of Aguadilla, of the Department of Commerce of Puerto Rico.

> "The learned trial court found that Ramos Villanueva's dismissal was mainly due to his political affiliation. It then applied the rule laid down by the Federal Supreme Court in *Branti v. Finkel*, 445 U.S. 507 (1980), and concluded that the dismissal was null. Its decision was correct."

Then it added:

> "Once these points of the evidence have been clarified, it is easy to see that the hiring authority's action constitutes an undue intrusion on Ramos Villanueva's right not to be discriminated against because of political beliefs, a right which is enshrined in our Constitution. Art. II §§ 1, 4, 6, 7. There is no doubt as to the substantial nature of this right —fundamental in a democratic form of government, and a corollary of dignity, respect, and equality before the law. Although it is not unlimited, it may, in certain circumstances, yield before high-ranking communitary interests (Citations omitted) —and in the circumstances of the instant case—and subject to a strict judicial scrutiny (Citations omitted) —this right should prevail."

In *Carmen I. Díaz de Llobet v. Office of the Governor*, 112 D.P.R. 747 (1982) the Supreme Court of Puerto Rico dealt with an officer in the Governor's Mansion or Executive Offices. The Court applied, for the second time, the *Elrod-Branti* principle indicating:

> "The allegation of politico-partisan discrimination is a very serious one. Easy obstacles that enervate the due process of law should never be raised before it. As part of our mandate, BAPAS[11] should pass first on said allegation. Díaz de Llobet's classification as a confidential employee does not

[11] Board of Appeals for the Personnel Administration System.

> militate against it. Although it is true that because of such condition she does not have a property interest over her job, the doctrine laid down in *Branti v.Finkel*, 445 U.S. 507 (1980), is applicable. Under that doctrine, she would have a cause of action for retaining her confidential position if the dismissal was based on politico-partisan reasons, unless the Government could show that political affiliation was an adequate requirement for the effective discharge of her duties."

In *Olivieri v. Pierluissi*, 114 D.P.R. 23 (1983), the Supreme Court of Puerto Rico dictated, eleven years after *Báez*, supra:

> "In *Báez Cancel v. Mayor Mun. of Guaynabo*, 100 D.P.R. 980 (1972), we gave full force and effect to the constitutional guarantee against discrimination by reason of political ideas, Art. II, Sec. 1, of the Constitution of Puerto Rico. There we issued a strong statement against that old and unfortunate tradition existing at the municipal level, and stated that a presumption of discrimination is established when, absent a justifying rational motive, the dismissed employee is replaced by another one of a different political persuasion: that of the appointing authority in office. The uncouth practice we rejected in *Báez Cancel*, supra, at 980, still subsists in our country. However, a decade later it has been replaced by a more artful routine where legitimate reasons of economy are used to cover up violations to Act No. 5 of October 14, 1975, on Public Service Personnel, 3 L.P.R.A. 1301 *et seq*. This is a way of encouraging the spoils system. These negative dynamics, more characteristic of the political retaliation of our time, 'require the courts to sift the evidence in order to ascertain that no discrimination actually exists.' *Báez Cancel*, supra, at 988."

In *Báez Cancel*, supra, and *Olivieri v. Pierluissi*, supra, the Supreme Court of Puerto Rico relied in its decision on Section One, Article II, of the Constitution of the Commonwealth of Puerto Rico.

But in *Ramos Villanueva*, *Díaz de Llobet*, and *Colón v. CRUV*, supra, the Supreme Court of Puerto Rico has relied entirely on

First Amendment rights, as guaranteed by the Constitution of the United States, and as advanced by *Elrod v. Burns*, and *Branti v. Finkel*.

For the Supreme Court of Puerto Rico there is no quarrel between Act No. 5 of 1975 and its Merit System (3 L.P.R.A., § 1301, *et seq*), and First Amendment rights.

They have co-existed since 1982, when the Court in Puerto Rico adopted the *Elrod-Branti* rule, as indicated supra in *Ramos*.

On June 4, 1984, a few months before the 1984 elections there were seven Justices of the Supreme Court of Puerto Rico. Five of them, Justices Trias-Monge, Dávila, Irizarry-Yunqué, Díaz-Cruz and Torres-Rigual, after long years of meritorious service, have since retired.

All five named Justices were designated to the Supreme Court of Puerto Rico by Popular Party governors.

Their wisdom, experience and loyalty to their country is beyond question, as are the same traits in the two remaining Justices, Negrón-García and Reboyo-López, of those seven.

These seven gentlemen, in a unanimous decision, held the way they did in *Colón v. CRUV*, supra:

> "The Courts must break the trend and vicious circle established on the Island, of substituting government personnel, after each general election, on grounds foreign to a sound public administration: the political patronage and spoils system. Olivieri-Morales, supra. The scenario recurs each time there is a change in the political party in power. The adverse consequences are fatal and alarming; the reduction in funds is substantial. It is judicially recognized fact that payment of these types of dgments results in a financial crisis and has a negative impact on the budget. It constitutes a substantial detouring of public funds in detriment to the essential public services, independently from the recipient's political affiliation. The courts must exhaust all resources to design dissuasive remedies."

The Court in *Colón* calls for "urgent judicial remedial creativity" because the Court is aware that *the situation is critical*.

Colón v. CRUV dealt with Regional Directors holding the same positions as petitioners. Their positions in 1973 were designated

with the name of District Manager or General Supervisor.

The Supreme Court of Puerto Rico performed the scrutiny of their duties and functions and concluded: (App. K at p. A-78.)

> "To such effects, although their functions were confidential in nature, we note that the appointing authority has not been able to show that the political affiliation was an appropriate requirement for the discharge of the public office in question We are not surprised. We do not see that the faithful and efficient discharge of the duties of a District Manager or General Supervisor, as listed in OP-16 of the Personnel Office, of a public housing program requires a given loyalty to the ideological axioms of a political party. Such a preference is not necessarily a valid criteria for being either the person entrusted with implementing that social program's policies, or the recipient of such benefits. The only clear way to approach any application should be the need for housing and any other deserving factors of the case. Political affiliation is foreign to the process of eligibility. The following pronouncement is applicable:
>
> > [W]e may reasonably conclude that the hiring authority (the government) must present evidence to show that the employee's particular political affiliation is an 'appropriate requirement' for the effective discharge of the public office in question; that is to say, the Government must establish the existence of government interests that rank above the employee's rights under the First Amendment.
> > In the case at bar, the Government failed to establish this. *Ramos*, *supra* at 516.
>
> On the other hand, the highly charged political climate that unfortunately prevails in our country and permeates all governmental functions prevents us from discarding the possibility that, in a specific case, an employee not affiliated with the political party in power may turn his back on the requirements of his functions as a public servant. If the situation should arise, the determination as to the validity of his removal or dismissal should be made while taking into con-

sideration, among other circumstances—and aside from the fact that he may be a confidential employee—the opportunity that he has had under the new administration to show, within a reasonable term, that his competence, efficiency, and loyalty to public service axioms have not been affected and are above his personal political preferences."

Third: The Court of Appeals for the First Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In *Anderson v. City of Bessemer City, N. C.*, 105 S. Ct. 1504, March 19, 1985, the question before this Court was whether the Court of Appeals erred in holding the District Court's finding of *discrimination* to be clearly erroneous.

After discussing what a "clearly erroneous standard" is, this Court held that "this standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."

> "The reviewing Court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury appellate courts must constantly have in mind that their function is not to decide factual issues de novo' *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 89 S. Ct. 1562, 1576, 23 L.Ed. 2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." (At pp. 1511-1512.)
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> * * * * *
>
> "This is so even when the district court's findings do not rest on the credibility determinations, but are based instead on

physical or documentary evidence or inferences from other facts."(At p. 1512.)

* * * * *

"When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." (At p. 1512.)

Respondents requested that the Court of Appeals make an independent examination of the whole record relying in *Bose Corporation v. Consumers Union of U.S., Inc.*, 104 S.Ct. 1949 (1984). According to *Bose*, "judges must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." This is in protection of the First Amendment Right of Speech.

In the instant case the "independent review" was asked by respondents from the Court of Appeals and in performing such review, contrary to *Anderson*, petitioners were stripped of their *precious First Amendment rights* that had been awarded by the District Court and upheld by a Panel of the Court of Appeals on its Slip Opinion of December 20, 1985, which was later vacated.

Fourth: The factual analysis on which the Court of Appeals based its decision had no ground in the evidence before the trial court.

The Court of Appeals in its Opinion concludes that petitioners' positions are ones for which "party affiliation is an appropriate requirement for the effective performance" of the office.

To arrive at that conclusion the Court utilizes two inquiries: (a) whether the position involves government decision making on issues where there is room for political disagreement on goals or their implementation; (b) the inherent powers and privileges of the position of Regional Director.

The Court's inquiries and conclusion are based on a non-existent, putative evidence that just *was not* before the District Court Judge. The Court goes further and reproduces non-existent evidence in its Opinion.

Because of the seriousness of the matter, we proceed to explain.

In the case of *Jorge Hiram Collazo, et al. v. Jaime Torres Gaztambide, et al.*, case number 86-1116 (RLA), before the U.S. District Court for Puerto Rico, defendants offered the testimony of a Management Consultant, Dr. Jack Hirsbrunner, on July 10, 1985.

The testimony of Dr. Hirsbrunner was directed to the ultimate question, namely, "if political affiliation was an appropriate requirement of Collazo's position," as Regional Director of the Rural Housing Administration.

The Court admitted his testimony over petitioners' objections.

After the discussion the Court held:

> "So, what I'm going to do is allow him to testify on the theory that it would be interesting to see what he can say or advance to the Court, that will assist the Court in making its determination. And since I'm the ultimate trier of the facts I can reject or accept whatever he is going to say. So, on that basis, I will permit him to testify."

The expert's "knowledge" was acquired, according to him:

> "Yes, I had several meetings in the last few weeks in regard to that position with Mr. Cosme Hernández Silva, Victor Rivera the lawyer of the Department of Housing, the undersecretary of Housing Mr. Arce, the executive director of CRUV, Rolando Quevedo del Rio and assistant to the secretary, Paco Cruz, with the lawyers, Mr. Marcos Ramírez, José Sánchez (Respondents' attorneys) and with Jaime Barceló."

Counsel in the *Collazo* case were the same as in the *Jiménez-Fuentes* case, for plaintiffs and defendants. U.S. District Court Judge Raymond L. Acosta, who had listened to the expert witness, Dr. Jack Hirsbrunner, allowed the expert to testify in a limited manner in the *Jiménez-Fuentes* case.

Petitioners likewise objected to the expert witness's testimony in this case. Mysteriously, the Court Reporter, Cecil Ennett, disappeared without having made a transcript. The absence of a record cannot show that the expert was asked on August 7, 1985, a Wednesday, on cross examination, if it was not true that he was going to be a witness as "to the appropriateness of political

affiliation" in the case of *Armando Santana, et al. v. José Riefkohl, et al.*, the next Monday, August 12, 1985, before the Honorable Consuelo Cerezo, United States District Judge, in case number 85-1119(CC). His reply was in the affirmative. Next he was asked which was the government agency, and the witness could not say what agency it was.

Honorable Raymond L. Acosta, in his Opinion and Order in the instant case, indicated that: "The Court, after listening to the testimony and observing the demeanor of Dr. Hirsbrunner, gives no weight to his conclusion."

Due to the disappearance of the Court Reporter Ennett, parties had to proceed according to Rule 10(c) of the Federal Rules of Appellate Procedure.

Respondents submitted on April 30, 1986 their Statement of Proceedings supposedly corresponding to what transpired in the hearing on August 6 and 7, 1985.

Petitioners filed their Proposed Amendments to Defendant's Statement of Evidence, pointing out the following:

(1) That for the second time in the Appeal, defendants-appellants (respondents) had tried to bring into the record diagrams that were not admitted in evidence: the first time, two diagrams and then, included in Dr. Hirsbrunner's testimony, four others. They should be rejected.
(2) That defendants-appellants (respondents) offered in substitution of Dr. Hirsbrunner's testimony, a well written and organized academic thesis, which should be stricken.
(3) That the proper censure and sanctions be imposed on defendants appellants (respondents).

The District Court did not heed our petition and, pressed for time because of respondents' delay in submitting the Statement of the Evidence, incorporated Dr. Hirsbrunner's thesis as part of the Statement, including the diagrams and the statement that "his testimony consisted of the following opinion based on 'an extensive research' he made."

The unfortunate situation was that the Opinion of the Court of Appeals, affecting not only Jiménez and Vázquez, but hundreds of other claimants under the civil rights statutes, is based, simply, on non-existent testimony.

At the hearing on the Preliminary Injunction, defendants-appellants' other witness as to the "appropriateness of political affliation" was none other than the Executive Director of CRUV, Rolando Quevedo del Río, the defendant who co-signed Jiménez' and Vázquez' letters of removal, and selected their PDP replacements.

His testimony completely destroyed respondents' pretense at trial to establishing political affiliation as an appropriate requirement of the position of Regional Director of CRUV.

His testimony, in sum, was that he did not know the political affiliation of plaintiffs Jiménez and Vázquez at the time of their dismissal and, further, that he did not know the political affiliation of their replacements.

Due to the foregoing, petitioners vehemently objected to Dr. Hirsbrunner's testimony. It was obvious. The only respondent to sit in the witness chair denied the essence of the case, that is, that political affiliation is an appropriate requirement of the position. The expert witness's testimony would be useless except to impeach the party that brought him to Court. What was the expert needed for?

Nevertheless, the Court of Appeals down-played the untenable position of the nominating authority of CRUV, respondent Rolando Quevedo del Rio, and afforded complete faith and credit to the testimony of Dr. Jack Hirsbrunner, contrary to the established doctrine that when findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings. *Anderson*, supra.

The trial court gave "no weight" to the expert witness's testimony, not only because of its *content*, but also because of *his demeanor*. The Court of Appeals removed the determination of precious First Amendment Rights from judicial oversight and let it hinge on the opinion of a discredited expert witness.

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CONCLUSION

Elrod v. Burns was decided on June 28, 1976 and *Branti v. Finkel* was decided March 31, 1980, ten and almost seven years ago, respectively.

The Courts of Appeals of different Circuits have enunciated divergent doctrines based on their interpretation of the *Elrod-Branti* principle.

The Court of Appeals for the First Circuit in the companion cases of *Jiménez-Fuentes* and *De Choudens* has attempted to give a guiding beacon to U.S. District Courts in the adjudication of political patronage cases.

Unfortunately, the attempt to clear the issues has resulted in more confusion and insecurity to both nominating authorities and government employees.

The guidance of this Honorable Court is needed to chart the course for other federal courts to follow in their exercise of judicial oversight to protect cherished First Amendment rights.

RESPECTFULLY SUBMITTED.
In Washington, D.C., this 20th day of January 1987.

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